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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re FRANCISCO L., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO L.,

Defendant and Appellant.

F061919

(Super. Ct. No. JJD064726)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Juliet L. Boccone, Judge.

Candice L. Christensen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Leanne Le Mon, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., Franson, J.

STATEMENT OF THE CASE

On October 18, 2010, a petition was filed pursuant to Welfare and Institutions Code section 602, alleging that appellant, Francisco L., committed first degree burglary (Pen. Code, § 459, subd. (a)(1), count one),¹ resisted a peace officer (§ 148, subd. (a)(1), count two), and committed misdemeanor battery (§ 242, count three). On January 19, 2011, appellant admitted the allegations contingent upon receiving deferred entry of judgment (DEJ).

On February 2, 2011, the juvenile court found appellant unsuitable for DEJ. Appellant, however, reaffirmed his admission of the allegations in the petition. The court found that DEJ was not as restrictive a disposition as the court would like and noted appellant had been in “all kinds of trouble.”²

The court placed appellant on probation upon various terms and conditions. One of these conditions was that appellant was not to associate with the coparticipants in his crime, including Eric L., who is appellant’s cousin. Defense counsel requested that appellant be permitted contact with Eric L. during family gatherings without violating his probation. The court ordered appellant could have contact with Eric L. for a family social event, but that the two could not be “hanging out outside of a family event.” The clerk’s entry in the minute order states that appellant shall have no contact with Eric L., except in the presence of family. The court’s order of appellant’s terms and conditions of probation, however, states that appellant shall not associate with, or have contact by other means, with Eric L.

Appellant contends the juvenile court abused its discretion in denying him DEJ. Appellant further contends that the trial court’s order of his terms and conditions of

¹ Unless otherwise designated, all statutory references are to the Penal Code.

² In 2010, appellant also had three misdemeanor arrests for trespass.

probation conflicts with the court's oral pronouncement that he could associate with Eric L. at family social events.

FACTS

Misdemeanor Battery

At 9:15 p.m. on December 3, 2009, Officer Kirk was dispatched to a Save Mart in Porterville to investigate a battery. A loss prevention agent told Kirk that he witnessed two individuals physically attack another person inside the store. The two attackers, including appellant, were detained in the loss prevention office. The victim told the loss prevention officer that he had been mad-dogged by the coperpetrator and then the coperpetrator started hitting the victim in the face.

Appellant started to strike the victim as the victim was trying to protect himself. Appellant hit the victim in the face, head, and upper body area.

Resisting Arrest

On April 15, 2010, Officers White and Martinez were dispatched to a residence on Villa Street in Porterville where a trespass was in progress. White and Martinez found the residence to be locked and secured. A few moments after the officers returned to their patrol car, the person reporting the trespass contacted the officers and led them into the residence. The officers could see two Hispanic males running from the rear of the residence through an open fence and then entering the high school campus. The officers chased the juveniles and ordered them to stop, but they kept running into the campus. Martinez eventually detained appellant. The other minor was subsequently detained. Both minors were documented as Northern gang members.

Burglary

A.C. reported that at about 10:30 a.m. on October 14, 2010, she left her residence. When A.C. returned at 1:00 p.m., she observed the front door of her home open. A.C. saw a screen to her bedroom window was on the ground and the window was half open.

A.C. saw three Hispanic males standing on the street corner. They were staring at her as she looked over her home. The three males walked west on Cherry Avenue. A.C. had never seen the juveniles in the area before and their conduct seemed suspicious to her.

A.C. reported that her laptop computer and \$100 in coins were missing from her home. There were eight rolls of quarters and rolls of other coins. Officer Aguilar was dispatched to the scene at 1:19 p.m. Aguilar found three juveniles, including appellant, in the area. One juvenile had a blue paint smear on his pants. Aguilar found out by radio that A.C.'s home was painted blue. A community service officer from the Porterville Police department found three sets of footprints at the exterior of the residence, which were photographed. The shoe tracks of appellant and another minor matched those found at A.C.'s home.

Appellant spontaneously asked Officer Knox if the victim would drop charges if he could show them where the property was located. Appellant took Knox to his home, gave him permission to enter, pulled a cushion from a couch, and showed Knox A.C.'s laptop computer. Knox took the computer and collected an empty paper quarter roll. When Aguilar later interrogated appellant, appellant stated he broke into A.C.'s residence, climbing through a window, and stole the laptop and rolls of quarters. Appellant took the computer to his home.³

Probation Report and Juvenile Court Findings

Appellant told the probation officer that he had been expelled from school for trying to fight. Appellant was employed the summer of 2010 with the SEE program cleaning elementary schools. Appellant said he complied with curfews and got along well with his parents, following their rules. Appellant admitted that he smokes one joint

³ A coperpetrator also told officers that he stole the computer and coins. It appears, however, that the computer was found in appellant's home.

of marijuana a week. Appellant associates “with northern structure gang members.” Appellant denied being a gang member. The victim of the burglary sought restitution of \$100 for her stolen coins and \$100 for her computer power cord that was not recovered.

Appellant’s mother told the probation officer that appellant would not tell her anything about the incidents and she had not disciplined the minor for committing the offenses. The mother explained that her relationship with appellant is bad, he fails to complete his chores, does not abide with discipline she tries to impose, and leaves home without telling her where he is going. When mother tries to counsel appellant about his poor behavior and gang associations, he is unreceptive.

The probation officer noted that a mitigating factor was appellant’s receptiveness to comply with the terms of probation. Among the aggravating factors noted by the probation officer were appellant’s unsatisfactory performance on a prior electronic monitoring program, appellant was on informal probation when he offended, his gang affiliations, poor grades in school, and poor behavior at home. Also, appellant’s crimes were not committed at one time, but took place over a long period of time.

The probation officer noted appellant was not a suitable candidate for DEJ because he had educational, behavioral, substance abuse, and gang issues that needed to be addressed by services other than those available in DEJ. Appellant’s maturity was age-appropriate and he was not delayed in any area. Also, appellant and his family were in need of a higher level of supervision and assistance than available from the DEJ program. The probation officer considered other dispositional alternatives such as placement in a group, foster, or relative’s home, but appellant did not have the special needs that would require this type of placement.

The probation officer also considered commitment to the Tulare County Youth Treatment Center Unit, but rejected this alternative because appellant had not had the opportunity to redirect his behavior under the supervision of a probation officer. The

probation officer recommended appellant be placed on probation under the supervision of a probation officer and in the custody of his mother.

The juvenile court initially noted it was not going to find appellant suitable for DEJ. The court determined that appellant did not seek to withdraw his plea, even though he was receiving probation rather than DEJ. Defense counsel argued that appellant should receive DEJ. The court, however, stated that its “concern is that the DEJ is not quite as restrictive as I would like it.” The court noted appellant had been in “all kinds of trouble.” The court further noted appellant had done a good job until recently and that it was giving appellant the tools to make sure he did not offend again. The court found that appellant was not suitable for DEJ and the court wanted him to be successful. The court declared appellant a ward of the court.

Appellant was informed to set up his community service hours through the probation officer. Appellant was further informed to attend a school program as assigned by the probation officer or the school district. Appellant was again informed to contact the probation department within three working days of the disposition hearing date to discuss with them the requirements of his probation.

DEFERRED ENTRY OF JUDGMENT

Appellant contends the juvenile court abused its discretion by failing to impose DEJ. Appellant’s argument that the juvenile court erred in failing to place him on DEJ rests on a very positive reading of the probation report. Appellant notes that he was age-appropriate in his skills and resided with his mother. Appellant was willing to work with relatives and his family was willing to work with the programming provided. Appellant believes there was evidence that he was amenable to education, treatment, and rehabilitation and therefore the juvenile court abused its discretion when it placed him on probation rather than DEJ. We disagree and affirm the juvenile court’s disposition order.

The DEJ provisions of Welfare and Institutions Code section 790 et seq.⁴ provide that in lieu of jurisdictional and disposition hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment, deferring entry of judgment. After the juvenile successfully completes a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and the records of the juvenile court proceeding are sealed. (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558 (*Martha C.*))

Prior to or shortly after filing a petition, the prosecutor must review the minor's file and make a determination of DEJ eligibility. (§ 790, subd. (b).) If the prosecutor finds that the minor is eligible based on these factors, the prosecutor must file a declaration or state on the record the grounds for this determination and notify the minor. (§ 790, subd. (b); Cal. Rules of Court, rule 5.800.)⁵ The juvenile court must then consider whether to apply DEJ to the minor's case, taking into account several important factors, including the minor's age, maturity, educational background, family relationships, demonstrable motivation, treatment history, and other mitigating and aggravating factors.⁶

⁴ All further statutory references are to the Welfare and Institutions Code.

⁵ All references to rules are to the California Rules of Court.

⁶ Section 791, subdivision (b) provides:

“If the minor consents and waives his or her right to a speedy jurisdictional hearing, the court may refer the case to the probation department or the court may summarily grant deferred entry of judgment if the minor admits the charges in the petition and waives time for the pronouncement of judgment. When directed by the court, the probation department shall make an investigation and take into consideration the defendant's age, maturity, educational background, family relationships, demonstrable motivation, treatment history, if any, and other mitigating and aggravating

A minor who meets the statutory criteria for eligibility is not automatically entitled to DEJ. The determination to grant DEJ is subject to the discretion of the juvenile court. (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 604-605, 607.) As a result, the juvenile court must make an independent determination of the minor's suitability after consideration of the factors specified in rule 5.800 and section 791, subdivision (b), exercising its discretion based on the standard of whether the minor will derive benefit from education, treatment, and rehabilitation rather than a more restrictive commitment. (*Martha C., supra*, 108 Cal.App.4th at p. 562.)

Suitability factors include the minor's age, maturity, educational background, family relationships, motivation, any treatment history, and any other relevant factors regarding the benefit the minor would derive from education, treatment, and rehabilitation efforts. (Rule 5.800; see also § 791, subd. (b).) A court may conclude that the circumstances of a crime indicate that a minor is not amenable to rehabilitation. (*Martha C., supra*, 108 Cal.App.4th at p. 562.)

We review a court's denial of DEJ for abuse of discretion. (*In re Sergio R., supra*, 106 Cal.App.4th at p. 607.) Abuse of discretion implies the absence of arbitrary or capricious disposition, or whimsical thinking. Judicial discretion is abused when a court exceeds the bounds of reason given the circumstances under consideration. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Appellant's argument ignores the fact that he was on informal probation when he reoffended and his performance on electronic monitoring was unsatisfactory. Also,

factors in determining whether the minor is a person who would be benefited by education, treatment, or rehabilitation. The probation department shall also determine which programs would accept the minor. The probation department shall report its findings and recommendations to the court. The court shall make the final determination regarding education, treatment, and rehabilitation of the minor." (See rule 5.800; *Martha C., supra*, 108 Cal.App.4th at p. 559.)

appellant's offenses in the current petition occurred between December 2009, and October 2010. Appellant's offenses were not all at one time and appeared to be growing more serious over time. Appellant's grades were poor and his mother was having difficulty disciplining him. She had not imposed any discipline for the offenses set forth in the petition.

Appellant also ignores the fact that the probation officer considered not only the less restrictive alternative of DEJ, but also more restrictive alternatives than DEJ. The probation officer's recommendation was to place appellant on formal probation as a ward of the court. The juvenile court was well aware of DEJ as a dispositional alternative. The court was concerned, however, that DEJ was not as restrictive as the court would like and the court wanted appellant to succeed.

In the case of *In re Damian M.* (2010) 185 Cal.App.4th 1, 3-4 (*Damian M.*), a juvenile was arrested in San Diego at the border crossing from Mexico into the United States with 10.1 pounds of marijuana located in a hidden compartment in the gas tank. The juvenile admitted the allegation that he possessed marijuana for sale and, because he was eligible, requested DEJ. The juvenile court denied the juvenile's request, finding that he was not suitable to DEJ because of the sophistication of his offense. The court noted, however, that if the juvenile did well on probation, the court would consider dismissing the petition pursuant to section 782. (*Damian M.*, at pp. 3-4.)

The *Damian M.* court found that even though the minor was statutorily eligible for DEJ, the juvenile court did not abuse its discretion in denying DEJ. *Damian M.* reasoned that because of the sophistication of the minor's criminal activity, it was difficult to find the juvenile court's decision to place the minor on formal probation to be unreasonable. The *Damian M.* court found the juvenile court was aware of its discretion, had sound reasons for exercising its discretion, and the juvenile court's reasoning was supported by the record. (*Damian M.*, *supra*, 185 Cal.App.4th at p. 5.)

Like the juvenile court in *Damian M.*, the juvenile court in the instant action was well aware of its discretion and had sound reasons for the more restrictive disposition of formal probation. The court's reasons for doing so were amply supported by the record. Appellant argues that he qualified for DEJ because he was amenable to education, treatment, and rehabilitation and the juvenile court abused its discretion in selecting probation rather than DEJ. In making this argument, appellant marshals those facts that support his argument and ignores the evidence showing that his attempt at informal probation was unsuccessful. Appellant's argument also ignores the probation officer's observations that he had educational, behavioral, substance abuse, and gang issues that needed to be addressed by services unavailable in a DEJ program.

The juvenile court concluded that for appellant to succeed, he required the more restrictive alternative to DEJ, of wardship with the court, and formal probation. The probation officer and the court considered other alternatives and chose the one best suited for appellant's successful completion of services and exit from the juvenile justice system. Based on the record before us, we cannot say the juvenile court abused its discretion in finding appellant unsuitable for DEJ.

CONDITION OF PROBATION

The parties concur that condition nine of appellant's conditions of probation do not accurately reflect the juvenile court's oral pronouncement or the clerk's entry in the minute order. The court permitted appellant to have contact with coperpetrator, Eric L., who is also appellant's cousin, for family social events. Condition nine of the conditions of probation fails to set forth this fact and, as the parties concede, needs to be amended.

DISPOSITION

The case is remanded for the court to correct condition nine of the conditions of probation to reflect its oral pronouncement that appellant cannot associate with Eric L.,

except during family social events. The remaining orders of the juvenile court are affirmed.